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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Kathie DeSando,
Pensions Benefits Specialist 2
(PS7608U), Department of the
Treasury

Bypass Appeal

CSC Docket No. 2017-633

ISSUED: MAY 08 2017 (HS)

Kathie DeSando appeals the bypass of her name on the Pensions Benefits Specialist 2 (PS7608U), Department of the Treasury eligible list.

The appellant, a non-veteran, appeared as the second ranked eligible on the subject eligible list, which promulgated on September 5, 2013 and expired on September 4, 2016. A certification was issued on May 12, 2016 (PS160668). The appellant was listed in the first position on the certification. In disposing of the certification, the appointing authority bypassed the appellant and the second listed eligible and appointed the third and fourth listed eligibles.

On appeal to the Civil Service Commission (Commission), the appellant claims that the appointing authority has abused the intent of Civil Service law and rules governing the "rule of three" in order to give preferential treatment to lower ranked eligibles. She argues that the "rule of three" was clearly violated with the appointment of the fourth listed eligible from certification PS160668 since that appointment was not awarded to one of the top two listed eligibles. In other words, that appointment was awarded to an eligible who was outside the top three names listed on the certification. The appellant also states that she has more than 12 years of service; performs almost every duty in the job specification for the subject title; acts as a lead worker; performs complex duties; has the ability to review

eligibility and process health benefit applications; and was given access to the Judicial Retirement System.¹

In response, the appointing authority explains that certification PS160668 was triggered by provisional appointments to the subject title, resulting from classification reviews, of the third listed eligible and another individual who did not appear on the eligible list. The third listed eligible was reachable for a regular appointment and was regularly appointed. From the "second" group of eligibles consisting of the appellant, the second listed eligible, and the fourth listed eligible, who could be considered for the other position under the "rule of three," the fourth listed eligible was selected. The provisional appointee who did not appear on the eligible list was returned to his last permanent title. The appointing authority maintains that the appointments were made, and the certification was properly disposed of, in accordance with applicable rules and regulations.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. Moreover, it is noted that the appellant has the burden of proof in this matter. See *N.J.A.C.* 4A:2-1.4(c).

Initially, since the appellant, a non-veteran, was the first listed name on the certification, it was within the appointing authority's discretion to select any of the top three eligibles on the certification. The appellant contends that the "rule of three" was violated with the appointment of the fourth listed eligible since that appointment was not awarded to one of the top two listed eligibles. This contention is unpersuasive. Each appointment from a certification where multiple appointments are made is considered separately. Thus, the first appointment is made from the top three eligibles, and subsequent appointments are made from the top three eligibles on the certification as it stands after each previous appointment. See *In the Matter of Thomas D'Angelo* (MSB, decided October 22, 2003) (citing *Zigenfus v. Balentine, etc.*, 129 *N.J.L.* 215 (S.Ct. 1942)). In this case, once the third listed eligible was appointed to the first vacancy, the fourth listed eligible became reachable for the second vacancy under the "rule of three."

Additionally, even assuming, *arguendo*, that the appellant is more qualified for the position at issue, the appointing authority still has selection discretion under

¹ In the appellant's appeal, which is postmarked August 25, 2016, she also challenges her bypass on three earlier certifications from the subject eligible list. The dispositions of these certifications were recorded by this agency on May 20, 2015, September 15, 2015 and January 27, 2016, respectively. As such, the Commission declines to address these earlier bypasses as the appellant's challenge was not timely presented. See *N.J.A.C.* 4A:2-1.1(b) (providing that an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed).

the "rule of three" to appoint a lower-ranked eligible absent any unlawful motive. See *N.J.A.C. 4A:4-4.8(a)3*; *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D)*, *Ocean City*, 207 N.J. 38, 49 (2011). Compare, *In re Crowley*, 193 N.J. Super. 197 (App. Div. 1984) (Hearing granted for individual who alleged that bypass was due to anti-union animus); *Kiss v. Department of Community Affairs*, 171 N.J. Super. 193 (App. Div. 1979) (Individual who alleged that bypass was due to sex discrimination afforded a hearing). Moreover, the appellant does not possess a vested property interest in the position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. See *Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). The appellant has not presented any substantive evidence regarding her bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three."

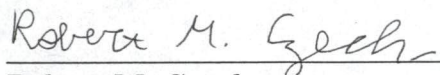
Accordingly, a review of the record indicates that the appointing authority's bypass of the appellant's name was proper and the appellant has not met her burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF MAY, 2017



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